Supreme Court, U.S.
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No. 99-1162

In The

Supreme Court of the United States

October Term, 1999

SYED ABDULLAH, et al

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Syed Abdullah, et al., respectfully submit this reply to the respondent's brief in opposition.

The government urges that review of the petitioners' claim that competent interpreters were required to be provided at their legalization office interviews (the "interpreter claim") is not warranted at this time because the court of appeals decision is interlocutory. Resp. 6, 7. In support of its contention, the government relies on this honorable Court's decision in Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) ("Bangor"). Resp. 6, 7.

That case is inapposite. In Bangor, the court of appeals for the District of Columbia remanded the case for further proceedings. The court of appeals did not, as here, vacate and reverse the decision of the district court, and grant summary judgment in favor of the opposing side. Similarly, in Virginia Military Inst. v. United States, 508 U.S. 946, 947 (1993), this honorable Court, reiterating the Bangor decision, denied the petition for certiorari because the court of appeals for the Fourth Circuit had remanded the case "for determination of an appropriate remedy." Id. at 946.

Here, the interpreter claim is ripe for review by this honorable Court for a number of reasons. First, while the interpreter claim is related to the pending claims in that all three claims arose out of the same or similar facts, it also stands on its own as a separate and discrete Constitutional challenge to the government's administration of the SAW statute. Because the court of appeals ruling was final as to the interpreter claim, it is eliminated from the litigation as if it had been adjudicated and disposed of on the merits, leaving nothing more for either the district court or the court of appeals to consider. See Catlin v. United States, 324 U.S. 229, 233 (1945) (a final decision is one which terminates the litigation on the merits and leaves nothing for the court to do but execute the judgment). Therefore, the court of appeals decision on the interpreter claim does not qualify as interlocutory. Even if the court of appeals decision were deemed interlocutory, this honorable Court has discretion to review decisions by a court of appeals before or after a court of appeals has rendered judgment, where a conflict exists between or among

circuits or where a decision is not in keeping with a relevant decision of this honorable Court. Moore's Federal Practice, Secs. 403.02[1], 403.03[2][b] (3d ed. 1999).

It would not, as the government urges, make better sense for this honorable Court to postpone consideration until petitioners' other two claims are litigated in the district court, appealed by one side or the other, and then disposed of in the court of appeals, when "petitioners may then file another certiorari petition." Resp. 7. What either side might or might not do at the end of the district court litigation, or following potential court of appeals litigation, is purely speculative. On the other hand, what a postponement of consideration could result in is the possibility of a second substantial litigation if, for example, this honorable Court reverses the court of appeals decision on the interpreter claim and remands it for further proceedings, long after the other two claims have been disposed of.

As the matter stands now, the district court has marked the case off calendar pending this honorable Court's decision on the petition for certiorari. The government has not yet answered the complaint as to the two remaining issues. No formal discovery has been conducted. There are several hundred petitioners involved. If the interpreter claim were reinstated at some future date, then the litigation as to that one issue would revert to the same posture as the remainder of the case is in now. Efficiency and manageability would dictate that all of the viable issues should be litigated in the same proceeding.

The government further argues that there is no conflict between the Eleventh Circuit's decision in Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991) ("Nelson") because the Nelson court was presented with an appeal from a grant of a preliminary injunction rather than an appeal from a decision on the merits. Resp. 7, 8. The court of appeals in this case made no such distinction in reaching its decision. In fact, the court of appeals adopted the Nelson court's assumption that "petitioners are entitled to the protections of the Due Process Clause in the adjudication of their SAW applications...." Pet. App. A10. The court reached a different conclusion because, unlike the Eleventh Circuit, it

premised its analysis under Mathews v. Eldridge, 424 U.S. 319 (1976) on the proposition that petitioners' status, i.e., "fac[ing] the government in a posture more similar to that of immigrants requesting...admission at the border than that of aliens defending the legality of their presence in the country at a deportation hearing," did not entitle them to an interpreter at government expense. Pet. App. A10. The court further viewed petitioners as affirmatively seeking a governmental benefit, therefore obligating them "to make appropriate arrangements to establish the proof necessary to meet their burden with the government." Pet App. A11. It is significant that, in weighing the third Mathews factor, the court failed to consider that the 1.3 million SAW applicants were each required by the government to pay $185 for, among other things, a face-to-face meeting with the government. Petitioners simply do not speak "huge number of languages" as the court of appeals suggests. Pet. App. A13. The cost of interpreters in the principal four languages of petitioners could have been covered by the more than 240 million dollars that the government collected from them or, if that were not sufficient, by increasing the application fee in the first instance.

In response to petitioners' argument that the government could at least have given petitioners advance notice that they were obligated to bring their own interpreter to the interview, the government urges that SAW applicants, unlike asylum applicants, are not entitled to advance notice because asylum applicants are subject to immediate referral for removal proceedings if their asylum application is denied. Resp. 11, 12 fn. 5. There is no qualitative difference between an asylum applicant and a SAW applicant in terms of status. Both sets of applicants seeking a governmental benefit are unlawful aliens who have "affirmatively petitioned the government for a status enhancement." Pet. App. A11. Unless their statuses are enhanced, they remain here unlawfully, always subject to removal proceedings at the government's election.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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